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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954

No. 352

HEARST CONSOLIDATED PUBLICATIONS, INC., *Petitioner*

v.

ROBERT R. STEVENSON, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York for $75,000 in an action for damages caused by libel.

OPINIONS BELOW

The opinion of the Court below is unreported. It is reprinted in the Appendix to this Petition. The opinion of the District Court on Petitioner's motion for new trial is printed on page 445 of "Appendix to Appellant's Brief" which was the printed record in the Court below and which is being filed with the instant Petition.

JURISDICTION

The judgment of the Court below was rendered July 27, 1954. The jurisdiction of this Court is invoked under Title 28 United States Code 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the limited review which the Court below gave to the District Court's action denying Petitioner's motion for new trial deprived Petitioner of its right to have an appellate review of the errors assigned, and was inconsistent with the proper discharge of the Court's duty under Title 28, U.S.C., Section 2106.

STATEMENT

The basis of federal jurisdiction in the District Court was diversity of citizenship, the Respondent being a citizen of the state of New York and Petitioner being a Delaware corporation which publishes a newspaper in New York, New York. The litigation was instituted by an action for libel based on the publication in Petitioner's newspaper of an article recounting certain charges made against Respondent by his wife. The charges had been made by Respondent's wife in support of her motion for temporary alimony, counsel fee and a bill of particulars in a separation suit which she had served but not yet filed against Respondent in the New York Supreme Court.

By pre-trial order the District Court formulated the issue to be tried as follows:

> "To what extent was Plaintiff damaged by the publication of the article complained of? These issues include matters relevant and material to Plaintiff's claim for punitive damages."

During the trial numerous objections were made by Petitioner and exceptions taken to rulings of the Trial Judge. The Jury returned a verdict as follows: $1,000 general damages, $24,000 special damages, and $50,000 punitive damages.

Petitioner filed a motion for new trial on numerous grounds including the excessiveness of the verdict for special and punitive damages. This aspect of the motion for new trial was based upon the contention that the evi-

dence adduced at the trial could not as a matter of law support any verdict for special or punitive damages, and in any event the amounts awarded were grossly excessive in the circumstances of this case.

The District Court denied the motion for new trial, and in its appeal to the Court below, Petitioner assigned as error, in addition to numerous others, the abuse of discretion committed by the District Court in denying Petitioner's motion for new trial because of the excessiveness of the verdict for special and punitive damages.

The Court below considered, and in its opinion disposed of all assignments of error, except the assignment of error that the denial of Petitioner's motion for new trial on the grounds of excessiveness of the judgment was an abuse of the discretion of the Trial Judge, in the light of the facts evidenced in the record pertaining to the issue of special and punitive damages.

The view of the Court below was that regardless of the merits of Petitioner's contention that the evidence in the record required a ruling that the judgment for special and punitive damages was excessive, the Court below was powerless to grant Petitioner any relief from the judgment. The Court stated that it had exhausted its "limited power of review" when it had considered whether certain factors, not present in the instant case, had entered into the computation of the amount of damages awarded. In so restricting the scope of its appellate review, the Court below stated that it was following its long established practice

> *"not to enter upon a consideration of whether the trial judge should have so appraised the facts evidenced in the record as requiring an exercise of his discretionary power to grant a new trial either with or without a conditional remittitur by plaintiff of part of the verdict".*

(Opinion pp. 12-13 of Appendix, emphasis supplied)

An assignment of error that the evidence adduced at the trial bearing upon the issue of special and punitive

damages could not as a matter of law support the amount of the judgment was held by the Court below as falling outside the scope of its permissible review as a federal appellate court.

REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Court below, with respect to the limitations on its power to determine whether the District Court abused its discretion in denying a new trial on the grounds of excessive damages, is in conflict with decisions of Courts of Appeals in other Circuits on the same matter. The effect of this self-imposed limitation by the Court below was to deprive Petitioner of any opportunity to correct the abuse of discretion committed by the Trial Judge in denying Petitioner's motion for new trial. In other Circuits litigants are afforded such an opportunity. The existence of a conflict among the Circuits on so important a matter calls for the exercise by this Court of its appellate jurisdiction to resolve the conflict so that litigants may receive justice uniformly throughout the federal judicial system.

The Court below cited earlier decisions of that Court to support its "long established practice". The earliest of these cases is *Miller* v. *Maryland Casualty Co.*, 2 Cir., 40 F. (2d) 463, in which Judge Learned Hand speaking for the Court in 1930 said at page 464:

> "The practice of this court has been uniform to refuse to consider any orders denying new trials, with the exception of Harrison v. U. S. (C.C.A.) 7 F. (2d) 259, which followed Mattox v. U. S., supra. New York & T. S. S. Co. v. Anderson (C.C.A.) 50 F. 462; Denison v. Shawmut Mining Co. (C.C.A.) 159 F. 102; Reader v. Haggin (C.C.A.) 160 F. 909; Worden v. Kenny (C.C.A.) 239 F. 131; Ford Motor Co. v. Hotel Woodward Co. (C.C.A.) 271 F. 625; Harison v. U. S. (C.C.A.) 7 F. (2d) 259. The books are full of similar cases in other circuits too numerous to cite, in many of which the reason given was that the order was

discretionary, and which apparently implied that there might be a review if the aggrieved party could show that the discretion had been abused. Acting upon this, in several cases orders refusing new trials because of the amount of the verdict have been in fact reversed, though apparently in ignorance of the limitations in the dictum in Southern Ry. Co. v. Bennett. And so the gloss has become the supposed principle, and there has undoubtedly grown up a notion that in general there may be extreme cases where this is a good ground for appeal. However, so far as we have found, all the actual decisions except one, when this has been done, are either where the jury gave nominal damages, that is, where they did not attempt to appraise the plaintiff's loss at all; where their verdict was less than the amount of the loss which the defendant did not dispute; or where damages were not involved. In the first class is Pugh v. Bluff City Excursion Co., 177 F. 399 (C.C.A. 6) In the second are Glenwood Irrigation Co. v. Vallery, 248 F. 483 (C.C.A. 8); United Press Associations v. National Newspapers Association, 254 F. 284 (C.C.A. 8); and Stetson v. Stindt, 279 F. 209 (C.C.A. 3). In the third are James v. Evans, 149 F. 136 (C.C.A. 3), and Frye v. Lyon, 299 F. 926 (App. D. C.). All these are within the limits suggested in Southern Ry. Co. v. Bennett, and the exception, Cobb v. Lepisto (C.C.A.) 6 F. (2d) 128 (C.C.A. 9) so far as we can find, stands alone."

Although *Cobb* v. *Lepisto* may have been the only decision in conflict with *Miller* v. *Maryland Casualty Co.* in 1930, in the intervening years other Circuit Courts of Appeals have followed *Cobb* v. *Lepisto,* with the consequence that at the present time there is a clear conflict among the Circuit Courts of Appeals on the matter. Decisions of other Courts of Appeals in conflict with the decision of the Court below are:

Virginian Ry. v. *Armentrout,* 4 Cir., 166 F. (2d) 400;
Southern Pac. Co. v. *Guthrie,* 9 Cir., 180 F. (2d) 295, on rehearing 186 F. (2d) 926;

Trowbridge v. *Abrasive Co. of Philadelphia*, 3 Cir., 190 F. (2d) 825;
Bucher v. *Krause*, 7 Cir., 200 F. (2d) 576.[1]

Brief quotations from the opinions of the Courts in cases just cited will point up the conflict in their decisions and the decision of the Court below. Thus, in *Virginian Ry. Co.* v. *Armentrout, supra*, Judge Parker, speaking for the Court, said at pages 407-8:

> "And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an

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[1] In addition to the direct conflict between the decision of the Court below and decisions of the Courts of Appeals for the 3rd, 4th, 7th and 9th Circuits, herein pointed out, reference to the decisions of the Courts of Appeals for the remaining Circuits reveals what appears to be a straddling position, since they cannot be definitely classified as adopting either side of the conflict. See Foley v. Capone Electrical Co., Inc., 1 Cir., 194 F (2d) 605; Sunray Oil Corp. v. Allbritton, 5 Cir., 187 F (2d) 475, on rehearing, 188 F (2d) 751; Sebring Trucking Co. v. White, 6 Cir., 187 F (2d) 486; St. Louis Southwestern Ry. Co. v. Ferguson, 8 Cir., 182 F (2d) 949; Smith v. Welch, 10 Cir., 189 F (2d) 832. The position of the Court of Appeals for the District of Columbia is clearly in conflict with the decision of the Court below. Boyle v. Bond, 187 F. (2d) 362. An excellent review of the conflicts in the opinions of the Courts of Appeals may be found in 6 Moore, Federal Practice § 59.08(6), pp. 3834-41 (2nd Ed. 1953). The author at p. 3829, *supra*, regards the better rule to be that the record should be reviewed on appeal and the lower court reversed if abuse of discretion is found in a denial of a new trial for excessiveness or inadequacy of damages.

abuse of discretion, analogous to error of law, and as such reviewable on appeal."

* * * * * *

"The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under section 22 of the Judiciary Act of 1789, 28 U.S.C.A. § 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439. We do not understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."

In *Southern Pacific Co.* v. *Guthrie*,[2] Judge Pope, speaking for a majority of the Court, said:[3]

"There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., supra, as follows: 'The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it. * * *'"

* * * * * *

[2] 9 Cir. 180 F (2d) 295.

[3] *Id.* at 304.

"* * * On the other hand, in Cobb v. Lepisto, 9 Cir., 6 F. 2d 128, this court remanded a case with directions to order a new trial unless an excess amount, stated by this court, were remitted. In Department of Water & Power of City of Los Angeles v. Anderson, 9 Cir., 95 F. 2d 577, while finding the verdict there in question not to be 'grossly excessive', this court stated the rule of Cobb v. Lepisto to be as follows, 95 F. 2d at page 586: 'Although it was held in Southern Ry. Co. v. Montgomery, 5 Cir., 46 F. 2d 990, 991, that a Circuit Court of Appeals has 'no jurisdiction to correct a verdict because it is excessive,' the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive' '. In Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, the Court of Appeals for the Fourth Circuit, reversed the judgment and ordered a new trial in a personal injury case because of its determination that the verdict was excessive notwithstanding the trial judge had denied a motion for new trial made upon this ground. The court cited Cobb v. Lepisto, supra, with approval and said: 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. * * * 'The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. * * *[15] (166 F. 2d 408)"[4]

[15] Cobb v. Lepisto, supra, prior to the decision in Virginian Ry. Co. v. Armentrout, supra, has been stated to stand alone. See Miller v. Maryland Casualty Co., 2 Cir. 40 F. 2d 463. Cf. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, footnote 14, page 485, 53 S. Ct. 252, 255, 77 L. Ed. 439. It dealt with a verdict in an action to recover the value of services rendered, something more readily calculated than the compensation for pain, suffering, and the like.

"Southern Railway Co. v. Bennett, supra, and the earlier cases asserting want of power to review the action of the trial court in denying a new trial on the ground of excessiveness of the verdict, were explained by Judge Learned Hand in Miller v. Maryland Casualty Co., 2 Cir., 40

[4] *Ibid.*

F. 2d 463. The rule is there said to be based upon a procedural difficulty in that historically the writ of error did not afford review of the trial court's action upon a motion for a new trial, and it was said that the appeal later provided for was subject to the same limitations. Subsequently in Fairmount Glass Works v. Coal Co., 287 U.S. 474, 482, 53 S. Ct. 252, 254, 77 L. Ed. 439, the Supreme Court expressly referred to the decision in Miller v. Maryland, supra, saying: 'It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co. (2 Cir.), 40 F. 2d 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment.' "

Speaking only for himself, Judge Pope, went on to say:

"The writer of this opinion thinks that this court should remand this case with directions to grant a new trial unless the appellee shall file his consent in writing to remit from the judgment now entered the sum of $20,000 together with all interest, if any, which may have accrued upon the amount so remitted."[5]

* * * * * *

"* * * He is of the opinion that a disclaimer of appellate power such as that stated in Scott v. Baltimore & O. R. Co., supra, is a manifestation of a momentum generated in the earlier cases, and not yet arrested simply because the courts expressing this doctrine have failed to note that the procedural obstacles which originally prevented apellate review no longer exist, as was stated in the Fairmount Glass Works case, supra, note 15.[16] In his opinion the doctrine of impotence expressed in the cases mentioned is due for a general overhauling and he thinks that the decision of Judge Parker in Virginian Railway Co. v. Armentrout, supra, points to the reasons why this court should not abdicate the power which it has previously asserted in Cobb v. Lepisto, supra, and Department of Water & Power v. Anderson, supra.[17]"[6]

"[16] Rule 75 of the Federal Rules of Civil Procedure relating to the record on appeal, is even more inclusive than the bill of exceptions referred to in the Fairmount Glass Works case. In the field of criminal appeals the Supreme Court in Griffin v. United States, 336 U.S. 704, 69 S. Ct. 814, noted no procedural difficulty in reviewing the trial court's

[5] *Id.* at 305.

[6] *Ibid.*

action upon a motion for a new trial notwithstanding the earlier disclaimers of authority in cases such as Blitz v. U. S., 153 U.S. 308, 14 S. Ct. 924, 38 L. Ed. 725. Cf. National Bank of Commerce v. U. S., 9 Cir., 224 F. 679, 683. The rational explanation is to be found in Rule 39(b), Federal Rules Criminal Procedure, 18 U.S.C.A. incorporating the rules and practice governing civil appeals."

"[17] Cf. Pacific Greyhound Lines v. Rumeh, 9 Cir., 1949, 178 F. 2d 652, in which this court considered at length the question whether the verdicts there were excessive."

It is significant that after its decision in *Southern Pac. Co.* v. *Guthrie, supra,* the Ninth Circuit Court of Appeals granted the appellant in that case a rehearing on the question of "whether the damages are excessive, and if so, what the action of the Court should be." 186 F. (2d) 926.

In *Trowbridge* v. *Abrasive Company of Philadelphia,*[7] the Court speaking through Judge Staley said:

> "We need not decide, however, whether the verdict is excessive, for this court will not substitute its judgment for that of the jury or the trial court. The question of excessiveness of a verdict is primarily one for the trial court; where, however, the verdict is grossly excessive, the denial by the trial court of a motion for a new trial constitutes such an abuse of discretion that this court will remand the cause for a new trial.[10] *A careful study of the evidence of damages in the record has failed to convince us that the verdict was so grossly excessive as to justify reversal on this ground."*[8] (Emphasis supplied)

"[10] Dubrock v. Interstate Motor Freight System, 3 Cir., 1944, 143 F. 2d 304; Virginian Ry. Co. v. Armentrout, 4 Cir., 1948, 166 F. 2d 400; Kos v. Baltimore & O. R. Co., 6 Cir., 1928, 28 F. 2d 872; Spero-Nelson v. Brown, 6 Cir., 1949, 175 F. 2d 86; Southern Pac. Co. v. Guthrie, 9 Cir., 1951, 186 F. 2d 926. This rule is in accord with the implication of the Supreme Court in Affolder v. New York, C. & St. L. R. Co., 1950, 339 U.S. 96, 101, 70 S. Ct. 509, 94 L. Ed. 683."

In *Bucher* v. *Krause,*[9] the Ninth Circuit Court of Appeals, through Judge Lindley, reviewed the precise question presented by this Petition, as follows:

[7] 3 Cir., 190 F. (2d) 825.

[8] *Id.* at 830.

[9] 9 Cir., 200 F. (2d) 576.

"Specifically, we are interested here in the extent, if any, to which the exercise of this discretion is reviewable by an appellate court. An old procedural impediment forbidding review of an order denying a motion for new trial no longer bars judicial review. See Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 482, 53 S.Ct. 252, 77 L.Ed. 439; Wetherbee v. Elgin, Joliet & Eastern Ry. Co., supra; Rule 75, Fed. Rules of Civ. Proc. 28 U.S.C. However, the underlying reason for the former controlling rule was not always clearly stated, with the result that generalizations to the effect that appellate courts may never review an order denying a motion for new trial were contained in many opinions. See Chicago & N. W. Ry. Co. v. Green, 8 Cir., 164 F. 2d 55; Chicago N. W. Ry. Co. v. Kelly, 8 Cir., 74 F. 2d 31.

"Indeed, there are still some comparatively recent decisions denying the right to review the exercise of the trial court's discretion. Scott v. Baltimore & O. R. Co., 3 Cir., 151 F. 2d 61; McCoy v. Cate, 1 Cir., 117 F. 2d 194. Some of these cases appear to reach the rather astounding conclusion that there is no power to review an alleged abuse of the lower court's discretion. Recognizing the emasculatory effect of such a doctrine on their reviewing function, some courts have resorted to 'accepted' bases of review. Thus, in Earl W. Baker & Co. v. Lagaly, 10 Cir., 144 F. 2d 344, 154 A.L.R. 1098 and Snowden v. Matthews, 10 Cir., 160 F. 2d 130, the court indicated that passion and prejudice on the part of the jury could, in the case of an excessive verdict, be inferred from the enormity of the sum awarded. This court has rejected such a rationale. See Wetherbee v. Elgin, Joliet and Eastern Ry. Co., supra and cases there cited. Another inventive process offered to justify review is found in Sinclair Refining Co. v. Tompkins, 5 Cir., 117 F. 2d 596, wherein it was held that any large verdict will always impel a careful search of the record for prejudicial error. Such an approach we think is misleading, for the existence or non-existence of procedural error in the trial of a cause should seldom be decisive of the propriety of the size of the verdict.

> "There are, however, many decisions of relatively recent date, with which we find ourselves in accord, which meet head on the problem at hand and conclude that a court of review may, with propriety, ascertain whether the trial court abused its discretion in failing to grant a new trial because of an excessive verdict. Cobb v. Lepisto, 9 Cir., 6 F. 2d 128; Southern Pac. Co. v. Guthrie, 9 Cir., 180 F. 2d 295, on rehearing, 9 Cir., 186 F. 2d 926, certiorari denied 341 U.S. 904, 71 S.Ct. 614, 95 L. Ed. 1343; Covey Gas & Oil Co. v. Checketts, 9 Cir., 187 F. 2d 561; Virginian Ry. Co. v. Armentrout, 4 Cir., 166 F. 2d 400, 4 A.L.R. 2d 1064; see also, Trowbridge v. Abrasive Co. of Philadelphia, 3 Cir., 190 F. 2d 825, 830; Consumers Power Co. v. Nash, 6 Cir., 164 F. 2d 657, 660; dissenting opinions of Judge Holmes in Sunray Oil Corp. v. Allbritton, 5 Cir., 187 F. 2d 475, on rehearing 188 F. 2d 751. These decisions, we believe, are representative of the correct view with respect to appellate authority to review the trial court's discretion. If that discretion be abused, this court will not be powerless to act."[10]

The Court below attempted to reconcile its decision with Judge Lindley's analysis in *Bucher* v. *Krause, supra,* by asserting that its affirmance of the District Court after exhausting its limited power of review was consistent with the "holding" of *Bucher* v. *Krause,* which likewise affirmed the trial court's denial of a new trial on the grounds of excessive damage. But the significant difference between the two decisions and the reason they are in conflict is that the Court of Appeals in the *Bucher* case affirmed the District Court after it had reviewed the claim of excessiveness in the light of all the record facts bearing upon the issue of compensatory and punitive damages, whereas the Court below refused to consider whether the record facts in this case bearing on special and punitive damage could, as a matter of law, justify the amount of damages that had been awarded. The appellant in *Bucher* v. *Krause* obtained from the Court of Appeals the review which Petitioner requested but did not obtain from the Court below.

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[10] *Id.* at 586.

It is respectfully submitted that the Court below was in error in restricting the character of review afforded Petitioner and that the conflicting decisions in the 3rd, 4th, 7th and 9th Circuits, cited above, should be accepted by this Court as expressing the proper function and duty of a federal appellate court.

2. The status of the law on the issue presented by this Petition is unsettled not only because of conflicts in the decisions of different Courts of Appeal, but also because of the various interpretations that have been placed on the statement of this Court in *Affolder* v. *New York, Chicago and St. L. RR. Co.*, 339 U.S. 96 at page 101. In that case this Court said:

> "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."

It would logically follow from the foregoing statement that this Court is of the opinion that it is appropriate for a Court of Appeals to consider and pass upon the question of whether the amount of damages awarded by a District Court is excessive in the circumstances of the particular case. The *Affolder* case came to this Court from the Court of Appeals for the 8th Circuit. The question was next considered by the 8th Circuit Court of Appeals in *St. Louis Southwestern Railway Company* v. *Ferguson*, 8 Cir. 182 F. (2d) 949. The 8th Circuit Court of Appeals characterized the above-quoted statement of this Court in the *Affolder* case as "dictum" and pointed out that this Court was in error in implying that the Court of Appeals had considered the question of excessiveness of the judgment when it reviewed the *Affolder* case. 182 F. (2d) at page 955.[11]

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[11] Although intimating that it should not consider the "dictum" of this Court controlling until a clearer expression of the law had been announced, the 8th Circuit Court of Appeals in *St. Louis Southwestern Ry. Co.* v. *Ferguson, supra*, reluctantly considered whether there had been an abuse of discretion by the trial court in refusing to set aside a verdict for excessiveness, 182 F. (2d) 949, at page 955.

The Court below in the instant case gave no weight at all to the above-quoted statement of the Court in the *Affolder* case. It disposed of Petitioner's contention as follows:

> "The appellant suggests that appellate power to review a verdict for alleged excessiveness was recognized in a dictum in *Affolder* v. *New York*, and *St. Louis RR Co.*, 339 U.S. 96—a decision in 1950 which reversed on another ground a decision by the Court of Appeals for the Eighth Circuit. But the Eighth Circuit Court of Appeals when the question was next before it, did not read *Affolder* as so holding, *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 8 Cir. 182 F. (2d) 949, and we agree."[12]

With all deference, it is submitted that the Court below misread the opinion of the Eighth Circuit Court of Appeals in *St. Louis Southwestern Ry. Co.* v. *Ferguson, supra.* That opinion leaves no doubt that the Eighth Circuit Court of Appeals correctly read the "dictum" of this Court in *Affolder* as recognizing appellate power to review a verdict for alleged excessiveness. What the Eighth Circuit Court of Appeals said was that the Supreme Court had misread the opinion of the Court of Appeals in *Affolder.* But whether or not the Court of Appeals in the *Affolder* case had passed upon the question of whether the amount of damages awarded by the District Court was excessive in the circumstances of that case, it is perfectly apparent that this Court did consider and decide that question. If it was proper for this Court to review the judgment in *Affolder* for alleged excessiveness, it must follow that the Court below was in error in holding that it was without power to afford Petitioner such a review of the judgment of the District Court.

Courts of Appeals in other Circuits have not construed the opinion of this Court in the *Affolder* case as did the Court below. On the contrary, they have read the opinion as confirming not only the power but also the duty of a Court of Appeals to consider an assignment of error based

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[12] Appendix, p. 13.

upon the excessiveness of the amount of damages awarded by the District Court. Thus in *Southern Pac. Co. v. Guthrie, supra,* the Ninth Circuit Court of Appeals stated:

"Even if there had been any previous reason for doubt on this question, it would seem to have been put to rest by the statement of the Supreme Court in Affolder v. New York, Chicago & St. L. R. Co., 339 U.S. 96, 70 S.Ct. 509, decided after this court's former opinion in this case. There 339 U.S. at page 101, 70 S.Ct. at page 511, the court said of the claimed excessiveness of the verdict: 'We agree with the Court of Appeals (8 Cir., 174 F. 2d 486) that the amount of damages awarded by the District Court's (79 F. Supp. 365) judgment is not monstrous in the circumstances of this case.' This language would be without point unless the Supreme Court was of the opinion that it might do something about the excessiveness of the verdict if its amount could be called 'monstrous'. This is not, we think, substantially different from our statement in the Department of Water & Power case, supra, that 'the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive.'"

"The statement made by the Supreme Court in the Affolder case has been drawn in question by the court whose decision was there reviewed. In St. Louis Southwestern Ry. Co. v. Ferguson, 8 Cir., 182 F. 2d 949, the court suggests that the language used by the Supreme Court discloses a mistaken assumption as to what the Court of Appeals had held. With apparent reluctance it recognized the possibility that the rule was as stated in the Affolder case, saying: 'It may be that a change in the rule is desirable, to allow a general review of the question of excessiveness, such as is the practice in many state appellate courts, or with a more restrained sense of responsibility, perhaps, to permit judgment to be passed upon whether there has been an abuse of discretion by the trial court in refusing to set aside a verdict on motion for new trial.' 182 F. 2d at page 955.

> "For the reasons previously stated, we think, contrary to what the Court of Appeals for the Eighth Circuit implied, that what was said in the Affolder case was foreshadowed in the Fairmount Glass Works case. In the face of this statement in the Affolder case we are not prepared to withdraw what this court said in Cobb v. Lepisto."[13]

A similar interpretation of this Court's holding in the *Affolder* case was adopted by the Seventh Circuit Court of Appeals in *Bucher* v. *Krause, supra,* at page 587.

3. The question presented by this Petition is one which goes to the very heart of our federal judicial system. One of the principal arguments justifying the system of discretionary review by this Court on petition for writ of certiorari is that all litigants in the federal courts are entitled to one appellate review on all questions of law by a Circuit Court of Appeals. Whether or not a District Judge abuses his discretion in denying a motion for new trial on the grounds of excessive (or inadequate) damages is a question of law, not a question of fact. Leaving the determination of such a question to the sole judgment and conscience of the trial judge is repugnant to theory and philosophy underlying the federal judicial system.[14]

Fortunately, in many of the Circuits, at the present time, a litigant in the federal courts is assured that he will receive at least one review by a federal appellate court of any judgment against him which he believes to be excessive. In the Second Circuit, however, unless the decision of the Court below is reversed, a litigant can obtain no relief from an arbitrary refusal by the Trial Judge to grant a new trial on the grounds that the evidence does not reasonably

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[13] 186 F. (2d) 931.

[14] See the learned exposition of the early law on this subject of appellate review for excessiveness or inadequacy of damages and the responsibility of the Court of Appeals on this question under existing law as contained in the dissenting opinions of Judge Holmes in *Sunray Oil Corporation* v. *Allbritton,* 5 Cir., 187 F. (2d) 475, 477, on rehearing 188 F. (2d) 751, 752.

support the amount of the verdict. Litigants in the federal courts of the Second Circuit, therefore, are deprived of review which is accorded to litigants in state courts and in many of the other federal circuits.

Moreover, a clear enunciation by this Court that Courts of Appeals of all Circuits have the power and duty under Section 2106 of Title 28, USC to afford a litigant relief from an excessive judgment for damages would go far to stop "forum shopping" in libel and other tort actions. The power to grant a new trial or to direct a remittitur of a portion of the damages as an alternative to a new trial, where the District Court has awarded excessive damages, must exist in the federal appellate courts if litigants who are sued in Federal Courts are to receive equal justice with those sued in State Courts. The case of *Covey Gas & Oil Company* v. *Checketts*, 9 Cir. 187 F. (2d) 561, is in point. There the Court, speaking through Chief Judge Denman, said (at p. 563):

> "This is a clear case of what is aptly called 'forum shopping.'[2] The identical case was brought in the state District Court of Idaho against the appellant and its employee Bowman, the truck's driver. A verdict for $40,000 was rendered against both defendants, which the trial judge set aside on the sole ground that it was excessive, and a new trial was ordered. The plaintiffs then dismissed the suit as to the appellant and brought the instant suit against it in the United States District Court, apparently seeking the decision of a judge who would sustain a larger award than the state judge.
>
> "On the appeal in the Idaho suit, Checketts v. Bowman, 70 Idaho 463, 220 P. 2d 682, 684,[3] the state supreme court upheld the trial court's decision that the damages awarded were excessive but gave the plaintiffs the choice of a remittitur of the verdict's amount

"[2] Horowitz, Erie R.R. Co. v. Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies, 23 So. Calif. L. Rev. 204, 215."

"[3] Decided after the order denying a new trial in the instant case."

to $20,000 as an alternative to the granting of a new trial. * * *

"* * * *

"* * * Following the language of the Idaho Supreme Court, the cause, is remanded with directions to the district court to enter judgment on the verdict for plaintiffs in the sum of $20,000, if within 30 days of the filing of the remittitur in that court the plaintiffs file a written consent to the reduction of the verdict and acceptance of judgment in the amount of $20,000, or in the event of plaintiffs' failure to file such consent, to order a new trial. The appellant is awarded its costs."

It is not without significance that respondent brought suit in the New York state court against News Syndicate Co., Inc., publishers of the Daily News in New York because it also had published the charges which respondent's wife had made in support of her motion for temporary alimony. The circulation of the Daily News was 2,100,000 and that of Petitioner's paper 105,000. Respondent recovered a verdict of $25,000 against the News Syndicate Co. *Stevenson* v. *News Syndicate Co., Inc.*, 302 N.Y. 81. It is likewise significant that no verdict for an individual, or a corporation, in the amount of $75,000 has ever been sustained on appeal in the courts of the state of New York. In the Court below, Petitioner marshalled the cases that had been decided in the New York appellate courts, which showed how essential the exercise of the power of the appellate court to reduce an excessive judgment or direct a new trial has been to the proper administration of justice. That such an avenue of relief would have been available to Petitioner had it been sued in the State Court is not open to question. *Evans* v. *Star Company*, 216 App. Div. 736, affirmed 243 N.Y. 626; *Crave* v. *Bennett*, 77 App. Div. 102; *Bishop* v. *New York Times Company*, 194 App. Div. 881, 214 App. Div. 723; *Van Siclen* v. *Bush*, 254 App. Div. 851, affirmed 279 N.Y. 753; *Foerster* v. *Ridder*, 275 App.

Div. 665; *Corrigan* v. *Bobbs-Merrill Co.*, 182 App. Div. 919; *McMahon* v. *New York News*, 51 App. Div. 448; *Gideon* v. *Daily Mirror, Inc.*, 263 App. Div. 807, affirmed 289 N.Y. 767; *Fleetwood Foundation, Inc.* v. *Daily Mirror, Inc.*, 243 App. Div. 687, affirmed 267 N.Y. 582; *Mogle* v. *Franz*, 267 App. Div. 423.

It is unnecessary for the purposes of this Petition to show here what the Court below refused to consider—namely that the evidence adduced by Respondent in support of its claim of special damages could not legally justify the award of $24,000 and that the circumstances surrounding the publication of the article complained of bearing on the question of whether any punitive damages should have been awarded, could not on any theory of the case justify an award of $50,000. Petitioner was entitled to have the Court below consider these contentions.

PRAYER

It is respectfully prayed that the writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment in this case, and upon such review reverse the judgment of the Court below and remand the case with instructions to afford Petitioner a review of its assignment of error that the District Court abused its discretion in denying a new trial on the grounds that the amount of special and punitive damages awarded was excessive.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 147—October Term, 1953.

(Argued January 15, 1954 Decided July 27, 1954.)

Docket No. 22916

ROBERT R. STEVENSON,
Plaintiff-Appellee,

v.

HEARST CONSOLIDATED PUBLICATIONS, INC.,
Defendant-Appellant.

Before:

FRANK, MEDINA and HINCKS,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Murphy, *J.*, presiding.

Action for damages caused by a libel published by the defendant resulting in a plaintiff's verdict as follows: $1,000 general damages, $24,000 special damages, and $50,000 punitive damages. After denial of motion for a new trial, judgment for the plaintiff was entered in the amount of $75,000 from which the defendant prosecutes this appeal. Affirmed.

McCAULEY & HENRY (Charles Henry, of counsel), *for Defendant-Appellant.*

GEORGE G. HUNTER, JR., (Frank H. Gordon and James T. Gallagher, of counsel), *for the Plaintiff-Appellee.*

HINCKS, *Circuit Judge:*

The jurisdiction of the court below is based on diversity of citizenship, the appellee (whom we shall occasionally designate as the plaintiff) being a citizen of the State of New York and the appellant (defendant below) a Delaware corporation which publishes in the City of New York a newspaper, the "New York Journal-American."

The libel complained of was published in the following circumstances. The plaintiff's wife, from whom he was estranged, had served, but not yet filed, a separation suit against him in the New York Supreme Court. Thereafter she filed in the New York Supreme Court a motion for temporary alimony, hearing on which had been adjourned until August 13, 1948, at which time on order of court it was permitted to be withdrawn. On that day the defendant's reporter, Cohen, went to the anteroom of the Courtroom in which Justice Greenberg had heard the morning's motion calendar. Seeing upwards of twenty files on the table he asked permission of Justice Greenberg to look at them, without mention of matrimonial files in general or the Stevenson file in particular. To this the Justice replied, "Well, go right ahead," whereupon the reporter without further formality examined the Stevenson file including Mrs. Stevenson's supporting affidavit wherein she charged the plaintiff, in intimate detail, with inexcusable neglect of herself, as his wife, as well as with unconventional association with other women. Some five days later the reporter, who knew throughout that the motion for alimony had been withdrawn, provided the defendant with a story which purported to be a resumé of the charges contained in the wife's affidavit. This story which was published in the New York Journal-American on August 19, 1948, is the publication here complained of.

The appellant in its amended answer to the complaint pleaded as "partial defenses" a "fair and true" news report and a belief reasonably induced by communications from reliable sources that its publication was true. By pretrial order, the issues to be tried were limited to the issue of damages thus in effect eliminating privilege as a defense in bar. No error is predicated on that order on this appeal. Indeed, the appellant on its brief on appeal concedes that the publication was not privileged, doubtless impelled to that concession, as indeed its brief shows, by the impact of *Stevenson* v. *News Syndicate Co.*, 302 N. Y. 81.

The story as published made no mention of the withdrawal of the motion; it incorrectly spoke of the charges therein as made "today" clearly implying that the motion was still pending. In sensationalized language, it unmistakably implied that the plaintiff was living in an illicit relationship with one of his office secretaries whom it named, although the wife's affidavit went no farther than to charge marital neglect and indiscreet and unconventional association with the woman named and others. The published story, because of this and other variations from the affidavit which it purported to report, was not privileged as a fair and true report of news: it was so held in *Stevenson* v. *News Syndicate Co., supra,* and we should so hold here if error had been predicated on the order below which eliminated privilege as a defense.

The appellant now contends that the amended complaint is so lacking in specificity that there is no adequate support for the jury's finding of special damages in the amount of $24,000. F. R. C. P. 9(g) requires that items of special damages when claimed "shall be specifically alleged." The amended complaint alleged that as a direct result of the publication the plaintiff's employer, a nation-wide corporation of which the plaintiff was the treasurer at an annual salary of $19,000, in October, 1948, compelled his resignation so that he thereby lost his position with its concomitant salary, except for one year's salary allowed him on separation, and that, despite diligent effort, the plaintiff thereafter was unable to obtain a higher salary than $10,000. It alleged further that as an incident of his involuntary resignation the plaintiff, then aged 42, lost an annual pension of $9,671 (with possible increment in the event of a subsequent increase in salary) to which he would have been entitled if he had retained his position until 65 years of age. $300,000 in special damages were claimed.

As pointed out in *Moore's Federal Practice* (2d Ed.) Sec. 9.08, when it comes to pleading special damages there is a distinction between cases in which special damage is essential to the cause of action and cases in which a cause of action exists irrespective of special damage. The cases cited by appellant all fall into the former category. Here we have to do with a publication which, since not privileged as a fair news report, was libelous *per se* under the applicable law of New York. *Stevenson* v. *News Syndicate Co.*, 302 N. Y. 81. See *Seelman* on *Libel and Slander*, Sec.

372. This being so, an allegation of special damage, under the law of New York, was not essential to make out a cause of action. A valid cause of action having been stated, we hold that the complaint sufficiently stated special damages within the requirements of Rule 9(g) which governs pleadings in the federal courts.

The appellant urges further that there was insufficient evidence to prove that the plaintiff's loss of employment was proximately caused by the publication complained of. In support of its position on this claim of error the appellant points to considerable evidence which, if considered alone would have supported a finding that the plaintiff's discharge was the consequence not of the published defamation but of the breach by the plaintiff of a "promise" given prior to the publication to his superior corporate officer to discontinue his association with the woman named. But the corporate officer (Gibson) to whom alone this promise was allegedly made failed to testify unequivocally to its existence. He said only that some six months before the publication he had "asked him to cease going with the girl" and was left with "the impression that he would not see" her again, etc., and definitely denied that the plaintiff had made any "pledge or * * * promise" not to see her. Another, the chief corporate officer, Francis, testified that Gibson had indicated to him that "in his (Gibson's) judgment" the plaintiff had broken a promise and that in direct conversation with the plaintiff after the publication, the plaintiff had admitted the promise but denied that he had violated it since he had done nothing wrong. The plaintiff, himself, on the trial, denied that he had made such a promise, testifying that he had indicated only an intent to discuss the subject-matter of their relationship with the woman involved. On such evidence the jury surely was not constrained to find a broken promise by the plaintiff.

But whether or not such a promise had ever been made, there was abundant evidence from which the jury could properly find that the plaintiff's discharge was a foreseeable consequence of the defamation. *Cf.* Prosser on Tort, page 809. The minutes of the meeting of the corporate executive committee which accomplished the discharge contained a recital by the corporate chairman that "after careful review of the facts it was clear that there was no question whatever about Mr. Stevenson's technical competence and that his affairs with the company were in per-

fect order." On trial, the corporate chairman testified to a discussion with the executive vice-president as to whether the plaintiff's "*reputation* had been impaired enough by this publicity to take any action."[1] On August 28, 1948, at a meeting of the executive committee a print of the publication was read at least in part and thereupon the plaintiff was given leave of absence for three months. The corporate chairman testified that plaintiff's *reputation* in New York had been hurt at least amongst corporate personnel in New York. The employer-corporation, itself, after plaintiff's discharge, offered him employment outside of New York and top executives were cooperative in his efforts to find other employment.

The effect of this evidence which strongly supported the finding is weakened little, if at all, by evidence that the plaintiff's private life was the sole cause of his discharge. True, there was evidence of belief that "his personal conduct had been such that he had lost the respect of the organization generally." But we find no evidence at all that this loss of respect existed prior to the publication. It is at least implicit in the evidence that the plaintiff's conduct, in view of his marital status, had been indiscreet long before the publication. But not until the publication occurred charging something more serious than unconventional conduct did the company take action to his hurt. Whether the corporate officers themselves believed the defamatory imputations of the publication is immaterial if—as they testify—they took action because of plaintiff's resulting loss of repute in the eyes of the personnel generally.

The appellant further predicates numerous claims of error upon rulings on the evidence. It attacks particularly the ruling excluded the complaint in the separation suit contending that it was admissible as matter "tending but failing to prove the truth" of the published charge and hence available to it "not in mitigation but reduction of damage." We hold, however, that the ruling was proper. The complaint, though pending, had never been filed and hence was not subject-matter of a privileged news report. *May* v. *Syracuse Newspapers,* 250 App. Div. 155; 294 N. Y. S. 867. Of course, the complaint was inadmissible

[1] Here, as elsewhere in this opinion, the emphasis put upon quotations is supplied.

as hearsay to prove the truth of its contents. And we cannot perceive how proof only of unfiled and unpublished *charges* made by the plaintiff's wife, which the appellant was not privileged to publish, could have had any bearing on malice or on any other open issue or a rational tendency either to mitigate or reduce the damages resulting from what the appellant did wrongfully publish. The case is not one in which the plaintiff ascribed deterioration in his matrimonial relations to the publication.

The appellant also criticizes rulings admitting the testimony of an actuary as to the present worth of sums representing, respectively, (a) the difference between the salary which the plaintiff would have received from his employer if he had remained in its employ at the same salary until 65 years of age, and the reduced salary (plus bonus) which the plaintiff was receiving from his new employer if continued at the same rate until the attainment of 65 years, and (b) the difference between his future pension rights based on the contributions which his former employer would have made under its existing pension plan had he remained in its employ until 65, and his pension rights based on his new employer's contributions under its existing pension plan if continued for a similar period. The contention is that such testimony, obviously offered on the issue of special damages, was inadmissible because based on unsupported assumptions as to the proper rate of discount for determining present value and as to what would have been the duration of plaintiff's employment by his old employer, but for the libel, or the duration (1) of his future employment with his new employer, (2) of his loss of reputation and reduced earning power, and (3) of the existing pension plans which as to future-accruing rights might be discontinued at the employers' option.

All objections based on such contentions we hold to have been properly overruled. There was highly credible evidence of plaintiff's history of business competence from which the jury might estimate the probable duration of his future employment. The actuary's figures were discounted—properly so for aught that appears—to reflect the possibility of death before 65. And a tort claimant is not to be held to the well-nigh impossible burden of proving future damages with more certainty than that attaching to plaintiff's proofs here. The actuary stated evaluations based not only on a 2% rate, but also on a 3% and

a 4% rate. It was left to the jury—and properly so on the record here—to decide which rate was appropriate and it was open to the appellant to offer evidence on that point. The jury was not bound by the testimony of plaintiff's actuary. And the award of special damages in the amount of $24,000 indicates that they liberally discounted the figures of the actuary apparently to reflect the uncertainties of the future to which appellant now points. Further claims of error based on the rulings on the evidence we hold to be without merit.

The appellant also claims error in the refusal of the trial judge to grant its request to charge, No. 5, which read, in so far as here pertinent:

> "The defendant committed no violation of any rule of the New York State courts in making the publication complained of. It had the permission of a Justice of the Supreme Court to examine the papers in the separation action of plaintiff's wife, and the fact that such order was not in writing is without significance. Justices of the Supreme Court may issue valid oral orders when the persons to be affected are present."

The circumstances under which the defendant's reporter obtained access to the papers in the separation suit are set forth at the beginning of this opinion. The plaintiff's complaint, obviously in support of plaintiff's claim for punitive damages, had charged that information from which the libel had been drawn had been obtained from the State Court "without court order or any other authority, illegally, improperly, contemptuously, and maliciously." The conduct of the appellant's reporter in obtaining access to the Stevenson matrimonial file had been vigorously attacked by plaintiff's counsel, and defended by appellant's counsel in their summations. Against this background, the charge to the point was clearly inadequate when it went no further than to say: "In determining the amount of such punitive damages, as well as in deciding whether they should be given at all, you may consider the nature of the publication, *the circumstances surrounding such publication, such as the manner in which the defendant obtained the information for the publication,* the motive of the defendant in publishing the article, and the extent of harm which it was a substantial factor in pro-

ducing to the plaintiff." The charge thus properly recognized that the jury, in its decision as to punitive damages, should take into account the propriety of the defendant's conduct in obtaining the information. But it wholly failed to instruct the jury as to how it should judge of the propriety of the defendant's proven conduct. The subject-matter was one depending upon a question of law as to which the jury obviously needed appropriate instructions. We think it clear that the charge as given was inadequate in this respect.[2] The error was so vital that the verdict—or at least so much thereof as was predicated on punitive damages—cannot stand if the appellant was prejudiced thereby as would be the case if its request were sound and yet had been refused. We turn, therefore, to examine the validity of its position as stated in Request No. 5.

Rule 278 of the New York Rules of Civil Procedure, under the heading of "Information as to details of matrimonial actions," provides as follows:

> "An officer of a court with whom the proceedings in an action * * * for divorce or separation are filed * * * or his clerk, either before or after termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court."

Clearly, the conduct of the appellant's reporter was in violation of this Rule unless authorized by an "order of court." Thus is posed the question whether the informal

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[2] Whether the instructions as to punitive damages were legally inadequate in any other respects is a question not saved by specific exception nor presented through refusal to grant any requested instructions. Nevertheless, we think it proper to make at least this observation. Compensatory damages, at least when awarded in substantial amount, have an obvious tendency to deter a defendant and others from other libelous conduct. Cf. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. R. 1173. Consequently, it would seem both proper and wise, in cases in which both compensatory and punitive damages are claimed, for the trier to remember, or to be reminded, that in addition to other factors to be considered punitive damages should be awarded only if and to the extent that such compensatory damages as may be awarded are found to constitute a deterrent not reasonably effective.

permission which was given to Cohen by the Justice amounted to an "order of court" in the circumstances here.[3]

As to this, the New York Civil Practice Act, Section 127, reads:

> "Definition of an order. A direction of a court or judge, made in an action or special proceeding, must be in writing unless otherwise specified in the particular case."

We hold that the exception made by Rule 278 "by order of the court" is limited by this section of the Practice Act which means just what it says. The rule recognizes a public policy[4] which precludes uncontrolled exposure of the detail involved in matrimonial actions to public view and the control provided is "order of court." Since the subject-matter is thus recognized as one touching public policy, it is altogether reasonable to infer an intent that an order of court shall stay the mandate of the rule only in situations to which the declared policy, in the court's discretion, is not applicable. We think it inherently reasonable to conclude that the Rule contemplated that discretionary orders thus touching public policy deserved the safeguard of written expression and that the legislature, in requiring that judicial directions in actions or special proceedings must be in writing, intended the requirement to be applicable to exceptive orders under the Rule.

Counsel for appellant argued both before the jury and before us on appeal that under the circumstances here it would have been a useless formality for appellant's reporter, when given oral permission to inspect the files, to have asked for a written order to that effect. But the argument, however plausible on the surface, is, we think, specious. Such a request might well have served to remind the Justice both of the existence of the rule and its

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[3] Whether the Rule contemplated a *written* order, was a point not before the court in *Stevenson* v. *News Syndicate Co.*, 302 N. Y. 81. For, as the opinion of the Appellate Division in that case shows, 96 N. Y. S. 2d 751, the complaint there alleged that the defendant there had obtained access to matrimonial files wholly "without court order" and the courts for purposes of these decisions assumed that allegation to be true.

[4] *Stevenson* v. *News Syndicate Co.*, 96 N. Y. S. 751.

applicability to the particular situation. It well may have been that after a busy morning on the bench dealing with upwards of twenty motions his mind was so filled with problems raised in contested motions that he completely forgot that the Stevenson motion, which had been withdrawn without contest, was among the others. A reminder of the rule by request for a written order might well have prevented the grant of a blanket permission. Certainly neither the testimony of the Justice nor that of Cohen, the reporter, all of which is included, *in extenso,* in the appendix to appellant's brief, contain anything to show that the public policy of the rule did not extend to the Stevenson papers.

We hold, therefore, that because appellant's Request No. 5 was not in accordance with the applicable law, its refusal was not error and the inadequacy of the charge to the point was not an error of which the appellant can complain.

The appellant criticizes the charge for the judge's failure to comment on the evidence. We agree that the case was one in which it would have been helpful to the jury and in accord with the better federal practice for the judge to marshal at least in outline the evidence on the principal contested issues. However, we cannot say that the charge was legally inadequate because of its failure to include balanced comment on the evidence. No exceptions to the charge as given were taken. We turn therefore to consider the claimed errors based on the appellant's requests to charge which the judge refused to grant.

By request No. 8, appellant asked the court to charge that the lapse of sixty days between the publication and the plaintiff's resignation might be considered on the issue of causal connection between the publication and the "resignation." The court in advance of the summations indicated that the request was granted but in the charge as given no reference was made to this lapse of time. In summation the appellant argued that if the discharge were the result of harmful publicity the employer would have accomplished the discharge forthwith, but "Instead,—they relieved Mr. Stevenson of duty for 90 days for the purpose of making a survey." It thus appears that appellant brought the point to the attention of the jury and, in view of the fact that the charge defined proximate cause in terms broad enough to permit consideration of time lapse on that

issue, we think a claim of prejudicial error cannot be predicated on the judge's failure, obviously inadvertent, to give this instruction even though he had previously indicated that the request therefor was granted.

Nor do we find any prejudicial error in the judge's treatment of appellant's other requests to charge. Of those to which appellant calls particular attention, a few contained an inaccurate statement and application of the law and the others not suffering from such defects did not conflict with the substance of the charge as given. Several requests not granted referred to particular items of evidence favorable to the appellants' contention: if granted, fairness would have required that they be balanced by reference to countervailing items of evidence supporting plaintiff's position. As indicated above, we think a summary of the evidence on both sides of the principal issues would have been desirable. But the inclusion of such material was within the discretion of the judge. And since the charge was fair in that it did not recite, and thus stress, only the evidence favorable to one party, we hold that the judgment should not be reversed for failure to comply with these requests.

After verdict, appellant moved to set aside the verdict and for a new trial on the ground that the verdict was excessive. This motion the trial judge denied, with a brief memorandum, and the appellant now predicates error on that ruling.

It is now a settled rule that federal courts of appeal, and the Supreme Court as well, will not review the action of the trial court in granting or denying a motion for a new trial for error of fact. This rule "has been frequently applied where the ground of motion was that the damages awarded by the jury were excessive or inadequate." *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481. However, the case just cited recognizes the existence of appellate right to review a denial of a new trial for errors of law such as an erroneous conception by the trial judge as to "matters which were appropriate to a decision on the motion." We turn therefore to examine the memorandum of the trial judge for such light as it sheds on the bases of his ruling.

This memorandum recites: "The atmosphere of this trial, as the record clearly shows, was quite the antithesis of passion and prejudice. The amount of punitive damages in New York, as in other states, must rest in large measure in

the discretion of the jury and there is apparently no legal formula requiring 'that punitive and actual damages must bear a definite mathematical relationship,' *Bell* v. *Preferred Life Assurance Society, et al.*, 320 U. S. 238, 242."

From this it is plain that the denial of the motion was not based upon a mistaken belief by the trial judge that he lacked power to disturb a verdict tainted by passion or prejudice. It shows further that he acted in the belief that under the law there was no necessary and "definite mathematical relationship" between punitive damages, which here happened to be assessed at $50,000, and compensatory damages, which here happened to be assessed at $25,000. Although the *Bell* case, which he cited to the point, was one involving the law of Alabama, we hold that the law of New York, which is applicable here, is in accord. In *Prince* v. *Brooklyn Daily Eagle*, 37 N. Y. S. 250, it was held that punitive damages might be recovered in a case in which only nominal damages were found. *Clark* v. *Variety, Inc.*, 178 N. Y. S. 698, and *Gomez* v. *Joyce*, 1 N. Y. S. 337, are to the same effect. And we find in *Bergmann* v. *Jones*, 94 N. Y. 51, sanction for instructions to a jury in accord with that rule. Annotations in 33 A. L. R. 384, 400 and 17 A. L. R. 2d 527, 542, indicate that the holding of these New York cases is in accord with the weight of authority elsewhere. See *Bucher* v. *Krause*, 7 Cir., 200 F. 2d 576, for its holding that the same rule is recognized in Illinois.

Thus we find in the record nothing whatever to suggest that the judge, in the exercise of the wide discretion confided to him, acted under any misapprehension as to the law. And we have no basis for disregarding the admonition of *Fairmount Glass Works* v. *Coal Co., supra*, P. 485, that "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

Finding that the action below did not proceed on error of law, our limited power of review is exhausted. To extend our review beyond this point would conflict with our long established practice, in accordance with the general rule of the *Fairmount Glass* case adverted to above, not to enter upon a consideration of whether the trial judge should have so appraised the facts evidenced in the record as requiring an exercise of his discretionary power to grant a new trial either with or without a conditional remittitur

by the plaintiff of part of the verdict. *Miller* v. *Maryland Casualty Co.*, 2 Cir., 40 F. 2d 463; *Caloric Stone Corp.* v. *Chemical Bank & Trust Co.*, 2 Cir., 205 F. 2d 492; *Kennair* v. *Miss. Shipping Co., Inc.*, 2 Cir., 197 F. 2d 605; *Nagle* v. *Isbrandtsen Co., Inc.*, 2 Cir., 177 F. 2d 163; *Press Publishing Co.* v. *Gillette*, 2 Cir., 229 F. 108, cert. den. 241 U. S. 661. We are pointed to no special circumstances here which take this case outside the rule of these cases. Our decision in *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598, was cited by the appellant for the statement that "appellate courts act in general only where an improper excess is clearly ascertainable from the record." But it will be noted that the holding of that case is in accord with our general practice. And the exception in the quoted excerpt from the opinion when read in connection with the cases to which it refers is seen to be without application to the situation here.

The appellant suggests that appellate power to review a verdict for alleged excessiveness was recognized in a dictum in *Affolder* v. *New York, Chicago & St. Louis R.R. Co.*, 339 U. S. 96,—a decision in 1950 which reversed on another ground a decision by the Court of Appeals for the Eighth Circuit. But the Eighth Circuit Court of Appeals, when the question was next before it, did not read *Affolder* as so holding, *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 8 Cir., 182 F. 2d 949, and we agree. In *Caloric Stove Corp.* v. *Chemical Bank, supra*, decided by this Court in 1953, some four years subsequent to the *Affolder* decision, we noted that the decision in *Fairmount Glass Works* v. *Coal Co., supra*, still "remained untouched." And we find no Supreme Court decision which sanctions more exceptions to the general rule of *Fairmount Glass* than those previously noted in *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80, the existence of which we recognized in *Miller* v. *Maryland Casualty, supra*. We conclude that in the situation here we are without power to extend our right of review beyond the search made as shown above for error of law entering into the discretionary action of the judge below.

This conclusion we think not in essential conflict with Judge Lindley's analysis in *Bucher* v. *Krause, supra*, upon which the appellant heavily leans. Certainly we agree with him as to the existence of a broad discretion in the trial judge in dealing with claimed excessiveness in a verdict. And as to power to review for "abuse of discretion," hav-

ing recognized and exhausted our power to review for error of law entering into the exercise of discretion made below, consistently with the holding of *Bucher* v. *Krause* we are not empowered or required to look farther. For in that case Judge Lindley went no further than to construe the verdict there involved as one including punitive damages which, under applicable law, he broadly defined and found to be "peculiarly within the discretion of the jury and of the court presiding at the trial" and without prescribed relationship to compensatory damages. All this was essentially a search for error of law. We have done all that except to construe the verdict which in this case needs no construction because in express language $50,000 was awarded as "punitive damages."

Judgment affirmed.

II

Judicial Code, c. 646, 62 Stat. 963, 28 U.S.C. 2106:

Sec. 2106. Determination

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Proof of Service

I, William J. Dempsey, one of the attorneys for Hearst Consolidated Publications, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 17, 1954 I served a copy of the foregoing Petition For Writ of Certiorari on Robert R. Stevenson, Respondent herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to his attorney of record, as follows:

To: George G. Hunter, Jr., Esq.
74 Trinity Place
New York 6, N. Y.

.....

WILLIAM J. DEMPSEY
Attorney for Hearst Consolidated Publications, Inc., Petitioner

Address: 938 Bowen Bldg.
Washington, D. C.

OCT 5 1954
HAROLD B. WILLEY, CL

Supreme Court of the United States

OCTOBER TERM—1954

No. 352

HEARST CONSOLIDATED PUBLICATIONS, INC.,

Petitioner,

—against—

ROBERT R. STEVENSON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

Proceedings and Opinions Below

On April 10, 1953, judgment for $75,000 on a jury verdict in this libel action was entered in the United States District Court for the Southern District of New York in favor of respondent against petitioner.

Petitioner moved for a new trial and, on May 29, 1953, that motion was denied. The opinion of the District Court denying that motion appears in the record (R. 445-446*).

The judgment was affirmed by a unanimous opinion of the United States Court of Appeals for the Second Circuit on July 27, 1954. The opinion of that court is as yet

* All references to the record are to page numbers in the Appendix to Appellant's brief in the Court below which has been filed as part of the record here.

unreported but it is printed in the Appendix to the Petition herein.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code 1254 (1).

III

Question Presented for Review

The sole question presented is this: After the Court below reviewed the action of the District Court in denying petitioner's motion for a new trial and found that the District Court proceeded under no misapprehension of law as to the wide discretion confided in it and made no mistake of law in denying said motion, was the Court below required to examine the amount of the verdict on petitioner's contention that it was too large?

IV

The Case

This is a libel action brought against the publisher of the "New York Journal-American" (R. 4-11). Respondent, plaintiff below, had been with General Foods Corporation for more than 20 years and was its Treasurer at a salary of $19,000 per annum (R. 39, 62). In August, 1948, petitioner published a sensational article stating that respondent's wife had that day accused him of deserting her, of living in adultery with one of his secretaries, and of having an adulterous affair with another employee (Pl. Ex. 1; R. 5, 12, 38). That the article was false never has been denied (R. 12-16).

Respondent, alleging that he lost his $19,000 position, together with valuable pension rights, as a result of the article, asked special damages as well as general and punitive damages (R. 4-11). The jury found special damages in the amount of $24,000, general damages in the amount of $1,000, and punitive damages in the amount of $50,000 (R. 394).

The verdict for special damages was supported by testimony of officers of General Foods Corporation who had read the article and had come to the conclusion that respondent's reputation had been injured to such an extent that he could no longer serve the interests of the company and that they had to request his resignation (Pl. Exs. 2 & 3; R. 44, 50, 168, 173-174, 178, 188-189, 203-204, 230, 251, 397-401). The amount of the special damages was supported by testimony that respondent, who was 42 years old and drawing a $19,000 salary as Treasurer with a prospective annual pension of $9,671, had thereafter taken another position at a salary of $10,000, the only position he could obtain after his discharge (R. 66, 69-70), and testimony of an actuary who, taking into consideration bonuses received in addition to that latter salary as well as pension rights in that new position, computed his prospective loss of earnings and pension rights to be in excess of $85,000 (R. 298-311).

The Court below reviewed the evidence supporting special damages and held that "• • • there was abundant evidence from which the jury could properly find that plaintiff's discharge was a foreseeable consequence of the defamation" (Appendix to Petition, p. 4). The Court below also observed, in upholding the admissibility of the testimony of the actuary, that the jury "• • • liberally discounted the figures of the actuary apparently to reflect the uncertainties of the future • • •" (Appendix to Petition, p. 7.)

In support of punitive damages, and showing malice, was evidence that the article was a report of an affidavit of respondent's wife filed by her in Supreme Court, New York, in support of a motion for temporary alimony, which petitioner's reporter had examined by invading a confidential file in violation of the rule of the court barring public inspection of matrimonial files* (Pl. Ex. 1; Def. Ex. A; R. 38, 88, 262-267, 274-279).

Also in support of punitive damages, and showing further malice, was evidence that the article was an untrue and an unfair report of the wife's affidavit in that it portrayed the wife as making those accusations that very day in court when petitioner knew that she had withdrawn her motion five days before and that it had never been considered on the merits (R. 271). And the affidavit itself revealed that it did not say, as did the article, that he was living in adultery with one of his secretaries but said, rather, that he was living in the home of the parents of a woman who, in fact, was not one of his secretaries at all (Pl. Ex. 1; Def. Ex. A; R. 38, 88).

The Court below, reviewing the order denying a new trial, ruled in respect to punitive damages that it was the law of New York that there was no necessary and definite mathematical relationship between compensatory and punitive damages (Appendix to Petition, p. 12).

The review of the Court below of the order denying a new trial embraced not only the punitive damages but the special damages as well. The Court said:

> "Thus we find in the record nothing whatever to suggest that the judge, in the exercise of the wide discretion confided to him, acted under any misapprehension as to the law. And we have no basis for dis-

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* Rule 278 of the New York Rules of Civil Practice.

regarding the admonition of *Fairmount Glass Works* v. *Coal Co.*, supra, p. 485, that 'Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct'" (Appendix to Petition, p. 12).

V

Reasons for Denying Certiorari

As just noted, the Court below did exhaustively review the refusal of the trial judge to set aside the verdict. The search was for errors of law but, in fact, all it failed to encompass was a comparison of its own estimate of the damages with the appraisal of the jury. That, however, is the very area of review which would encroach upon the exclusive province of the jury in violation of the admonition of this Court in *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474.

Furthermore, petitioner's position that the damages are excessive appears to be without merit. The verdict was based on solid evidence, painstakingly reviewed by the Court below, that petitioner wantonly and maliciously destroyed an outstanding career, brought about the loss of a $19,000 salary, and permanently impaired a reputation.

Petitioner refers to *Affolder* v. *New York, Chicago & St. Louis R.R. Co.*, 339 U. S. 96, where this Court observed:

> "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not *monstrous* in the circumstances of this case" (p. 101). (Italics ours.)

We do not see colorable argument that the verdict here is "monstrous," and there appears to be no basis for ask-

ing that this case be remanded for the purpose of further review on that premise.

Petitioner seeks to bring this case under the purview of Rule 19 by arguing that there is a conflict between this case and the following:

Virginian Ry. Co. v. *Armentrout*, 4 Cir., 166 F. 2d 400;
Southern Pac. Co. v. *Guthrie*, 9 Cir., 180 F. 2d 295, rehearing 186 F. 2d 926;
Trowbridge v. *Abrasive Co.*, 3 Cir., 190 F. 2d 825;
Bucher v. *Krause*, 7 Cir., 200 F. 2d 576, certiorari denied 345 U. S. 997, rehearing denied 346 U. S. 842.

Actually, none of those cases is in conflict with this.

Virginian Ry. Co. v. *Armentrout, supra,* involved a $160,000 verdict to a disabled child to cover future loss of wages. The appellate court found that the amount was so huge that interest on it alone, without ever touching principal, would be greatly in excess of future earnings of the plaintiff as estimated by the trial judge. The court, recognizing the rule that there can be no reversal for error of fact, stated it did not "understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion" and that "in a situation of that sort, reversal is no more based on 'error of fact' than reversal for refusal to direct a verdict for insufficiency of evidence" (p. 408). Holding that there had been an abuse of discretion in that case,* the court merely dealt

* That was not the only ground for reversal. The court found the charge to be prejudicial.

with a borderline circumstance difficult to classify as error of law or error of fact. The error there resulted from a patent mathematical miscalculation giving rise to an unsupportable verdict comparable to the exceptions mentioned in *Fairmount Glass Works* v. *Coal Co., supra,* at pages 483-484, such as damages in clear contravention of the instructions of the trial court. No such circumstance is present in the instant case and the Court below consequently did not deal with any problem even remotely similar. Indeed, as to special damages the exact opposite is true. The Court below observed that the jury "* * * liberally *discounted* the figures of the actuary * * *" called by respondent (Appendix to Petition, p. 7). (Italics ours.) And as to punitive damages the Court expressly ruled that there is no necessary mathematical relationship between compensatory and punitive damages (Appendix to Petition, p. 12). Thus there is no conflict between *Virginian Ry. Co.* v. *Armentrout, supra,* and the instant case for the clear reason that the former turned on a point wholly absent from the latter.

In *Southern Pac. Co.* v. *Guthrie, supra,* a $100,000 judgment for disabling injuries to a 58 year old locomotive engineer was left undisturbed. In affirming, the court said that "we cannot here reverse the action of the trial court unless the verdict can be said to be 'grossly excessive' or as stated in the *Affolder* case, 'monstrous'" and that the $100,000 verdict was neither (on rehearing at 186 F. 2d 926, 933). And in *Trowbridge* v. *Abrasive Co. of Philadelphia, supra,* the court refused to disturb a $126,000 judgment to a 44 year old disabled workman saying:

> "We need not decide, however, whether the verdict is excessive, for this court will not substitute its judgment for that of the jury or the trial court. The question of excessiveness of a verdict is primarily

> one for the trial court; where, however, the verdict is grossly excessive, the denial by the trial court of a motion for a new trial constitutes such an abuse of discretion that this court will remand for a new trial * * *" (at p. 830).

There is no conflict between either of those cases and the instant case. We cannot discover any valid basis at all for any assertion that $24,000 is either "grossly excessive" or "monstrous" compensation for the loss of a $19,000 position nearly five years before trial or that punitive damages of only twice the amount can be so characterized. After all, the injury inflicted here was wantonly and maliciously done. Petitioner engaged in near if not actual criminal means to get its story; it ignored the most elementary concept of fairness by reporting that charges were being made that day when it knew they had been withdrawn nearly a week before; and it falsely quoted a filed document as charging that a responsible business man was living in adultery with one of his secretaries when it did not so charge.

The remaining case cited by petitioner as conflicting is *Bucher* v. *Krause, supra,* where the court affirmed a $100,000 award for false arrest, false imprisonment, and assault. Judge Hincks, in the opinion below, points out the lack of conflict and observes that the review there, as here, essentially was a review for errors of law (Appendix to Petition, pp. 13-14).

Petitioner states at page 19 of its petition that the Court below refused to consider whether the evidence adduced could legally justify an award of $24,000 special damages. We believe petitioner is clearly mistaken. As noted above, the Court below expressly ruled that "* * * there was abundant evidence from which the jury could properly

find that plaintiff's discharge was a foreseeable consequence of the defamation" (Appendix to Petition, p. 4) and in ruling that the testimony of the actuary was properly received, observed that the jury "* * * liberally discounted the figures of the actuary * * *" (Appendix to Petition, p. 7). Likewise, petitioner states at page 19 of its petition that the Court below refused to consider whether punitive damages could "on any theory of the case" justify the amount of the award. We believe that also is a mistaken conclusion since the Court below expressly ruled that there is no necessary and definite mathematical relationship between punitive and compensatory damages (Appendix to Petition, p. 12).

Respondent respectfully submits that petitioner's application is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
October 1, 1954.

Respectfully submitted,

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Proof of Service

I, Frank H. Gordon, one of the attorneys for Robert R. Stevenson, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 1, 1954, I served a copy of the foregoing brief on Hearst Consolidated Publications, Inc., petitioner herein, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

To: William J. Dempsey, Esq.,
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Dated: New York, N. Y.
October 1, 1954.

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